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Joint Tortfeasors—Validity of Loan Agreements and Use of Pro Tanto Bar—*Tober v. Hampton*, 178 Neb. 858, 136 N.W.2d 194 (1965)

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Casenotes

JOINT TORTFEASORS—Validity of Loan Agreements and Use of Pro Tanto Bar—*Tober v. Hampton*, 178 Neb. 858, 136 N.W.2d 194 (1965).

The owners of a home destroyed by a gas explosion brought suit against one of two alleged joint tortfeasors.¹ The explosion was caused by the breaking of a gas main by the defendant construction company, and by the failure of the National Distributing Gas Company to rectify the dangerous situation.

Before this suit was instigated the plaintiffs entered into a loan agreement with the gas company whereby the plaintiffs received the sum of 3,500 dollars, repayable only out of the net recovery the plaintiffs might receive in a suit against the construction company, the other joint tortfeasor. The loan agreement appointed the officers of the gas company as the plaintiffs' agents and attorney in fact with irrevocable power to sue in the plaintiffs' name.

The district court, sitting without a jury, found that the loan agreement was a full and complete assignment to the gas company of all claims of the plaintiffs and as a result thereof the plaintiffs were not the real parties in interest.² The Supreme Court of Nebraska affirmed the district court's decision. The court held that in Nebraska there exists no right of contribution³ between joint tortfeasors,⁴ and applied the rule promulgated by the Supreme

¹ The Nebraska rule of joint liability is: "Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held for the entire damage—not because he is responsible for the act of the other but because his own act is regarded in law as a cause of the injury." *Stark v. Turner*, 154 Neb. 268, 274-75, 47 N.W.2d 569, 573 (1951); *Barry v. Moore*, 172 Neb. 57, 64-65, 108 N.W.2d 401, 405 (1961).

² NEB. REV. STAT. § 25-301 (Reissue 1964). "Every action must be prosecuted in the name of the real party in interest. . . ." The Nebraska interpretation is: "The real party in interest is the person entitled to the avails of the suit." *Dafoe v. Dafoe*, 160 Neb. 145, 150, 69 N.W.2d 700, 703 (1955).

³ *Tober v. Hampton*, 178 Neb. 858, 136 N.W.2d 194 (1965). The *Tober* decision clearly holds that contribution will not be allowed between joint tortfeasors in Nebraska. Until *Tober*, the status of contribution between joint tortfeasors was unclear in Nebraska. See Comment, 37 NEB. L. REV. 820 (1958), for a full discussion of this area preceding the decision in *Tober*.

⁴ There is an important distinction between contribution and indemnity. Contribution distributes the loss among the tortfeasors by requiring each to pay his proportionate share, while indemnity is the complete

Court of Louisiana that indemnity between joint tortfeasors is "... restricted to cases where actual fault is attributed to one party and the other party is only technically or constructively at fault. . . ."⁵

In applying these rules concerning contribution and indemnity between joint tortfeasors to the facts in *Tober*, however, the court was confronted with the effect and validity of a loan agreement entered into by the injured party-plaintiff and one of the two joint tortfeasors.⁶

I. THE STATUS OF LOAN AGREEMENTS

Loan agreements have been successfully used and upheld between insurers and their insureds based upon the early United States Supreme Court case of *Luckenbach v. W. J. McCahan Sugar Refining Co.*⁷ In such situations, the insurer loans money to the insured and takes back a loan agreement. This loan is repayable only out of any recovery the insured might receive in a suit against a third party responsible for the insured's loss or injury. In most instances the suit against the third party is brought under the direction of the insurer's counsel but in the insured's name.⁸

However, insurer-insured loan agreements have not altered the holding in the majority of jurisdictions, including Nebraska, that the insured is the real party in interest in a suit against a third party.⁹ These loan agreements merely avoid the subrogation¹⁰ to

shifting of the burden from one who paid to one who ought to be liable for the entire loss. See generally Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552 (1936); Bohlen, *Contribution and Indemnity Between Tortfeasors*, 22 CORNELL L.Q. 469 (1937); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932).

⁵ *Tober v. Hampton*, 178 Neb. 858, 872, 136 N.W.2d 194, 203 (1965).

⁶ It is important to note that *Tober* was not a suit on the loan agreement, but a suit against the second tortfeasor. The question of whether the plaintiffs were the real parties in interest was the real issue decided by the court. The validity of the loan agreement itself was not actually at issue, but only the effect it might have upon the real party in interest question. Thus it would seem that any inference from the opinion that the loan agreement is invalid per se would necessarily be dictum.

⁷ 248 U.S. 139 (1918).

⁸ This conclusion is apparent from the form of the loan agreement, which appoints the loaning party as the plaintiff's agent and attorney in fact to sue in the plaintiff's name.

⁹ Majority rule: e.g., *Bolton v. Ziegler*, 111 F. Supp. 516 (1953); *Aetna Freight Lines v. R. C. Tway Co.*, 298 S.W.2d 293 (Ky. 1957); *Blair v.*

which the insurer would have been entitled if actual payment for the loss had been made by the insurer to the insured instead of the loan. The avoidance of subrogation by the insurer is sanctioned by most judicial decisions due to the prejudicial effect¹¹ of a suit by an insurer in his own name against the third party wrongdoer. This prejudice¹² and the added factor that loan agreements ensure quick relief to the injured plaintiff,¹³ support the decisions upholding the validity of loan agreements in the insurer-insured situation. As one court summarily concluded: "A loan receipt is an instrumentality which permits an insurer to pay an insured *speedily* and yet press in court to recoup its losses from the wrongdoer without the insurer appearing by *name*, thereby avoiding some of the consequences of subrogation."¹⁴

The validity of loan agreements outside the insurer-insured situation is questionable. Their use in the joint tortfeasor area has been the basis for conflicting judicial decisions.¹⁵

Espeland, 231 Minn. 444, 43 N.W.2d 274 (1950). See generally Kessner, *Federal Court Interpretations of the Real Party in Interest Rule in Cases of Subrogation*, 39 NEB. L. REV. 452 (1960). *Contra, e.g.*, Hoxie v. Americus Auto. Co., 73 Ga. App. 686, 37 S.E.2d 808 (1946); Deming v. Merchants' Cotton-Press & Storage Co., 90 Tenn. 306, 17 S.W. 89 (1891). Nebraska rule: "An arrangement between an insurer and an insured, whereby the former loaned to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement and the loan thus made is not such a payment of insurance as to make the insurer the real party in interest." *Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc.*, 162 Neb. 47, 50, 75 N.W.2d 366, 368 (1956).

¹⁰ Subrogation is a doctrine founded on principles of natural justice, and "... is a remedy for the benefit of one secondarily liable, who has paid the debt of another and to whom in equity and good conscience should be assigned the rights and remedies of the original creditor. . . ." *Fidelity & Deposit Co. v. Atherton*, 47 N.M. 443, 448, 144 P.2d 157, 160 (1944).

¹¹ *E.g.*, *Bolton v. Ziegler*, 111 F. Supp. 528 (1953); *Klukas v. Yount*, 121 Ind. App. 160, 98 N.E.2d 227 (1951); *Blair v. Espeland*, 231 Minn. 444, 43 N.W.2d 274 (1950).

¹² *Cf.*, *Fielding v. Publix Cars, Inc.*, 130 Neb. 576, 265 N.W. 726 (1936). This case establishes the rule that it is grounds for a mistrial to show that defendant has insurance under which he will be indemnified if a judgment is rendered against him.

¹³ *Crocker v. New England Power Co.*, 348 Mass. 159, 202 N.E.2d 793 (1964); *Klukas v. Yount*, 121 Ind. App. 160, 98 N.E.2d 227 (1951).

¹⁴ *Klukas v. Yount*, *supra* note 13, at 165, 98 N.E.2d at 229. (Emphasis added.)

¹⁵ *E.g.*, *Western Spring Serv. Co. v. Andrew*, 229 F.2d 413 (1956); *Bolton v. Ziegler*, 111 F. Supp. 528 (1953); *Crocker v. New England Power Co.*, 348 Mass. 159, 202 N.E.2d 793 (1964); *Tober v. Hampton*, 178 Neb. 858,

In the joint tortfeasor situation, loan agreements are entered into between the injured party and one of the tortfeasors (or his insurer).¹⁶ When these contracts are upheld in the joint tortfeasor situation, one result necessarily occurs—the loaning tortfeasor is indemnified.¹⁷ He is indemnified when the injured party-plaintiff

136 N.W.2d 194 (1965); *Klukas v. Yount*, 121 Ind. App. 160, 98 N.E.2d 227 (1951).

¹⁶ There seems to be no justification for making a distinction between the case where the loaning party is the joint tortfeasor and the case where he is the tortfeasor's insurer. If the joint tortfeasor is entitled to indemnification, his insurer ought to be entitled to it in his place.

¹⁷ Although *Tober* talks of contribution, it cannot be secured by the use of a loan agreement made before suit is brought against either tortfeasor. Under such loan agreements, the loaning party receives, up to the full amount of his loan, all that is recovered by the plaintiff in a suit against the other tortfeasor. If the plaintiff recovers more than the full amount of the loan in this suit against the third party, the loaning tortfeasor recovers the full amount of his loan. If the plaintiff recovers less than the full amount lent to him, the loaning tortfeasor will recover an amount equal to the damages for which he might have been sued. The above conclusions can be best illustrated by the following example. Assume the plaintiff received from the loaning tortfeasor \$3,000 in the form of a loan agreement. If in the subsequent suit against the other tortfeasor the plaintiff recovers \$6,000, then the loaning tortfeasor is fully indemnified by a repayment of \$3,000 from the plaintiff under the terms of the loan agreement. If, however, the plaintiff recovers only \$2,000 from the other tortfeasor, the loaning tortfeasor is still legally indemnified. This is because at the time the loan agreement was entered into the plaintiff's damages were unascertained and unliquidated. Only when the plaintiff recovers the \$2,000 in the suit against the other tortfeasor are the plaintiff's actual damages ascertained, and the loaning tortfeasor is then known to have been liable (had he been sued directly) only for that amount and not more. Thus, when the lender receives the \$2,000 recovered by the plaintiff, he is indemnified for the full amount of his liability to the plaintiff. The amount paid by the loaning tortfeasor under the loan agreement was admittedly \$1,000 more than what he received in indemnification. This excess payment could arguably be construed as a gift or as an outright payment to deter litigation. At any rate, it is clear that the loaning tortfeasor, whether repaid the full amount tendered under the loan agreement or not, has been fully indemnified for his actual liability to the plaintiff. There has been no "contribution" as such.

Although the loan agreement as used in *Tober* seemingly results only in indemnity, contribution between tortfeasors may be secured by means other than a loan agreement. Contribution can always be secured by private agreement wherein the injured plaintiff successfully settles with both joint tortfeasors for equal or unequal amounts. Nothing prevents non-judicially enforced contribution. Contribution is also possible where the plaintiff sues both tortfeasors and recovers against both jointly and severally. Under an agreement to collect equal or unequal amounts from each, contribution can be obtained. It is only where one joint tortfeasor and the plaintiff make a loan agreement

recovers against the other tortfeasor, because the amount recovered by the plaintiff must be paid to the loaning tortfeasor under the auspices of the loan agreement.¹⁸ By this recoupment of the amount loaned under the agreement, the loaning joint tortfeasor may succeed in shifting the entire burden of the tortious act to the other tortfeasor.

The effect of indemnification of the loaning joint tortfeasor in the tortfeasor situation is, however, distinguishable from the effect a loan agreement has upon an insurer in the insurer-insured situation. In the insurer-insured situation, if actual payment of the insured's damages had been made by the insurer, the insurer would have been entitled to subrogation of the insured's claim. As previously pointed out, the loan agreement device merely avoids this subrogation and its effects. In the joint tortfeasor situation, however, if actual payment of the plaintiff's damages had been made by the loaning joint tortfeasor, instead of a mere loan, he would not be entitled to subrogation of the plaintiff's claim.¹⁹ His sole remedy would be to sue on his own cause of action for indemnity against the other tortfeasor. Loan agreements, then, have entirely different consequences in the two situations. In the insurer-insured situation, the loan agreement avoids an additional suit for subrogation, while in the joint tortfeasor situation, the loan agreement avoids an additional suit for indemnity of one defendant to another. Justification for the validation of loan agreements, therefore, should lie in the existence of subrogation rights in the former case and indemnity rights in the latter. If the insurer were not otherwise entitled to subrogation, or the loaning tortfeasor were not otherwise entitled to indemnification, the loan agreement would operate to permit indirectly what could not be achieved by the parties directly.

In *Tober* the Nebraska Supreme Court held that indemnity was

whereby the suit is brought against the other tortfeasor, that there is no contribution between the two wrongdoers. Under such situations, the loaning tortfeasor is fully paid back the amount of what would have been his liability to the plaintiff; this can only be construed as full indemnification.

¹⁸ This repayment is limited to the full amount paid out by the loaning tortfeasor under the loan agreement.

¹⁹ Subrogation will apply only where one secondarily liable has paid the debt of another who is primarily liable. *St. Paul Fire & Marine Ins. Co. v. Gallien*, 111 So.2d 571, 574 (La. App. 1959). It is an equitable right and will not apply where the equities of the parties are equal. *American Sur. Co. v. Citizens' Nat'l Bank*, 294 Fed. 609, 616 (8th Cir. 1923). The Nebraska rule is that joint tortfeasors are both primarily liable to the injured plaintiff and therefore neither can invoke the aid of the equitable doctrine of subrogation. See note 1 *supra*.

not available to the tortfeasors.²⁰ That ruling necessarily precluded the use of a loan agreement to seek the same result.

There are, however, cases that have upheld the validity of loan agreements in the joint tortfeasor situation, without regard to the resulting effect of indemnity. Such a position is exemplified by *Crocker v. New England Power Co.*,²¹ cited by the dissenting judge in *Tober*. That case involved a loan agreement between an insurer, which carried liability insurance for one of two joint tortfeasors, and the injured plaintiff. The court in *Crocker*, and the decisions upon which its reasoning is based,²² were not disturbed by the fact that the loaning party will receive indemnification.²³ These decisions were solely concerned with the intent of the parties and the form of the agreement.²⁴

The *Crocker* case and the decisions upon which it is based can only be distinguished from *Tober* by recognition of the different policy considerations of each court. The court in *Crocker* upholds the sanctity of agreement and the intent of the parties, regardless of the results. The Nebraska court in *Tober*, on the other hand, is not looking toward the protection of a written agreement nor toward the fulfillment of the intention of the parties,²⁵ but only to the ultimate effect of the loan agreement.

II. PRO TANTO BAR

By justifiably invalidating the loan agreement in *Tober*, the court brought into issue the applicability of the doctrine of pro tanto bar and its effect upon the plaintiffs' cause of action.

Pro tanto bar is the crediting of an amount received by a plaintiff from one tortfeasor,²⁶ not in full satisfaction of his dam-

²⁰ See note 5 *supra* and accompanying text.

²¹ 348 Mass. 159, 202 N.E.2d 793 (1964).

²² *Western Spring Serv. Co. v. Andrew*, 229 F.2d 413 (1956); *Wilson v. Anderson*, 113 Colo. 396, 157 P.2d 690 (1945); *Klukas v. Yount*, 121 Ind. App. 160, 98 N.E.2d 227 (1951).

²³ "We are not disturbed by the argument that a loan receipt agreement is a device to evade the rule that there can be no contribution among tortfeasors." *Crocker v. New England Power Co.*, 348 Mass. 159, 161-62, 202 N.E.2d 793, 795 (1964).

²⁴ "[I]t is the intention of the parties to the transaction which determines whether or not it is a loan or an absolute payment." *Klukas v. Yount*, 121 Ind. App. 160, 165, 98 N.E.2d 227, 229 (1951).

²⁵ "The questions presented here require us likewise to consider the purpose and effect of the loan agreements without regard to their form." *Tober v. Hampton*, 178 Neb. 858, 877, 136 N.W.2d 194, 205 (1965).

²⁶ The doctrine is applicable whether the tortfeasors are joint or independent. *Young v. Anderson*, 33 Idaho 522, 196 Pac. 193 (1921).

ages,²⁷ to an amount recovered by the plaintiff in a subsequent suit against any other tortfeasor also responsible for the plaintiff's damages. In order to apply the *pro tanto* reduction rule to any specific fact situation, the court must find that the payment received from one of the joint tortfeasors was in fact a part payment of the plaintiff's damages.²⁸

In the *Tober* case, the plaintiffs received the sum of 3,500 dollars under a loan agreement with the gas company, one of two alleged joint tortfeasors. This loan agreement could have been construed in either of two ways by the court.

First, if the loan agreement were held to be valid, being a repayable loan only, then the amount received as a loan could not be construed to have been received as a full or partial settlement of the plaintiffs' damages.²⁹ Therefore, *pro tanto* bar is not applicable to an amount received under a valid loan agreement, since *pro tanto* bar is only applicable when the plaintiff has received a partial settlement of his damages from one of the joint tortfeasors. If *pro tanto* reduction is inapplicable, the 6,540 dollars claimed by the plaintiffs in *Tober*, could not justifiably be reduced by the amount received under the valid loan agreement. Thus, as to the full 6,540 dollars, the plaintiffs are the real parties in interest.

Secondly, the loan agreement could have been held to be invalid—as it was in *Tober*. If the loan agreement were held invalid, the question of the application of *pro tanto* bar to a subsequent claim could only arise after a court determination of whether the amount the plaintiffs received was a full or partial satisfaction of their damages. If the amount received was held to be a full satisfaction of their damages, then the plaintiffs' suit could be dismissed because they would have been fully compensated by the amount received under the invalid loan agreement.³⁰ If, however,

²⁷ *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393, 131 N.W. 612 (1911).

²⁸ "Anything but full satisfaction results in *pro tanto* discharge, from whomsoever received." *Bolton v. Ziegler*, 111 F. Supp. 516, 525 (1953). Either an amount received as a result of a settlement with one of the tortfeasors or as a result of a judgment against one of the tortfeasors invokes the doctrine.

²⁹ *Ibid.*

³⁰ "[A]n injured party who releases one of several joint wrongdoers from liability for a consideration which he agrees to accept as full compensation for the injury done, thereby releases all who were jointly and severally liable therefor." *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393, 402, 131 N.W. 612, 615 (1911). But "[I]t is a well-settled rule that, where a release of one wrongdoer is not a technical release under seal, then the intention of the parties is to govern, and it becomes a question of fact for the court or jury whether or not what the releasor has

the amount received under the invalid loan agreement is held to be only a partial settlement of the plaintiffs' claim then the pro tanto reduction of the judgment sought in this suit would be appropriate. Even with the application of pro tanto reduction, the plaintiffs remain the real parties in interest in this suit. This can be seen by the following computation: This suit was for 6,540 dollars. The amount received under the invalid loan agreement as a partial settlement of the plaintiffs' damages was 3,500 dollars. By applying pro tanto reduction, the 6,540 dollars is reduced by 3,500 dollars. The resulting sum of 3,040 dollars is the amount that may be recovered by the plaintiffs in this suit. In regard to this amount they are the real parties in interest. Under either construction of the loan agreement, then, until the plaintiffs have been fully compensated for their damages they remain the real parties in interest.

The court in *Tober* held the loan agreement invalid. By applying pro tanto bar to the amount claimed in this suit, the court must have decided that the amount received, under the invalid loan agreement, was not the full amount of the plaintiffs' damages—an assumption based on the fact that pro tanto is only applicable when there has been only a partial satisfaction of damages. After applying the doctrine of pro tanto reduction, which is only applicable when the loan agreement is invalid, the court required any amount received in this suit to be repaid to the loaning tortfeasor. What the court failed to notice, apparently, is that a loan agreement is either valid or invalid. It cannot justifiably be valid, thereby requiring the plaintiffs to repay the loan out of any judgment they receive in this suit, and also invalid with regard to application of pro tanto bar. Yet the court in *Tober* declared that the plaintiffs are not the real parties in interest, because after applying pro tanto bar to the claimed 6,540 dollars and after requiring the plaintiffs to repay the gas company under a loan agreement already found invalid, the court left the plaintiffs nothing to claim in this suit for themselves. The court in dismissing the plaintiffs' cause of action inconsistently construed the loan agreement as valid for the application of repayment and invalid for the application of pro tanto reduction.

If the court had held that the full amount of the plaintiffs' damages was 3,500 dollars, the amount received and retained by them under the invalid loan agreement, then the plaintiffs would not have been the real parties in interest. Only then could the

received was received in full satisfaction of his wrong; and, if it appears that it was not so received, it is only *pro tanto* a bar to an action against the other wrongdoers. *Id.* at 401, 131 N.W. at 615, citing 24 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 307 (2d ed. 1903).

plaintiffs' cause of action be dismissed upon the justification that they had had full satisfaction of their damages.

III. CONCLUSION

Loan agreements rely upon the existence of allowable indemnity for their justification and validity in the joint tortfeasor situation. If indemnity is allowed in a given situation, objections to the use of a loan agreement must be rejected. If, however, a suit for indemnity is not allowed between two joint tortfeasors, loan agreements should not allow such a result indirectly. Therefore, it may be concluded that the use of loan agreements in Nebraska in the joint tortfeasor situation will only be upheld when a suit for indemnification would also be upheld.

Whether loan agreements are held to be valid or invalid in any given situation should not, however, preclude an injured plaintiff from receiving full compensation for his damages. In applying pro tanto reduction the court in *Tober* justifiably held that any amount received under the invalid loan agreement should be deducted from any judgment rendered in a suit against the other joint tortfeasor. The court ruled inconsistently though, in requiring the plaintiffs to pay back any money received in such a suit to the loaning joint tortfeasor. Since the loan agreement was held invalid, no repayment under it should have been required.

As a result of this inconsistent combination of pro tanto reduction and mandatory repayment under an invalid loan agreement, the court's decision that the plaintiffs were not the real parties in interest seems erroneous.

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